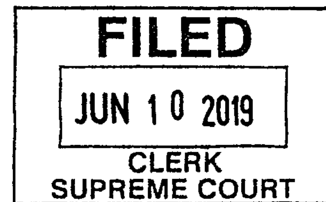


COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2018-SC-000241

RONALD EXANTUS APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HON. PHILLIP R. PATTON, SPECIAL JUDGE
INDICTMENT NO. 2015-CR-00090

COMMONWEALTH OF KENTUCKY APPELLEE

REPLY BRIEF FOR APPELLANT, RONALD EXANTUS

Submitted by:

KAREN SHUFF MAURER
ROY ALYETTE DURHAM II
ASSISTANT PUBLIC ADVOCATE
DEPT. OF PUBLIC ADVOCACY
5 MILL CREEK PARK, SECTION 100
FRANKFORT, KENTUCKY 40601
(502) 564-8006

COUNSEL FOR APPELLANT

CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Reply Brief were mailed, first class postage prepaid, to the Hon. Phillip R. Patton, Special Judge, P.O. Box 1359, Glasgow, Kentucky 42141; the Hon. Gordie Shaw, Commonwealth's Attorney, 187 South Main Street, Versailles, Kentucky 40383; the Hon. Keith Eardley, Assistant Commonwealth's Attorney, 187 South Main Street, Versailles, Kentucky 40383; the electronically emailed to the Hon. Kim Green, Assistant Public Advocate; the Hon. Bridget Hofler, Assistant Public Advocate; the Hon. Josh Miller, Assistant Public Advocate; and served by messenger mail to Hon. Thomas A. Van De Rostyne, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on June 10, 2019. The record on appeal was not checked out in preparation for this Reply Brief.

KAREN SHUFF MAURER

ROY A. DURHAM, II

PURPOSE OF REPLY BRIEF

The purpose of this Reply Brief is to respond to arguments set forth in the Brief for Appellee. Any issue not specifically addressed herein should not be construed as an adoption of or concession to Appellee's position. Rather, Ron Exantus believes his original brief has sufficiently and correctly addressed the matter.

STATEMENTS OF POINTS AND AUTHORITIES

PURPOSE OF REPLY BRIEF i

STATEMENTS OF POINTS AND AUTHORITIES ii

ARGUMENT 1

I. FAILURE TO GRANT A DIRECTED VERDICT OF ACQUITTAL AS TO THE THREE ASSAULT CONVICTIONS IS REVERSIBLE ERROR. 1

Tungent v. Commonwealth, 303 Ky. 834, 198 S.W.2d 785 (1947) 2

Wiseman v. Commonwealth, 587 S.W.2d 235 (1979) 2

Brown v. Commonwealth, 934 S.W.2d 242 (Ky. 1996) 2

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED RON EXANTUS INSTRUCTIONS ON FOURTH DEGREE ASSAULT AS TO BOTH KORAL TIPTON AND DAKOTA TIPTON. 3

III. FAILURE TO INSTRUCT ON THE ELEMENT OF "DANGEROUS INSTRUMENT" REQUIRES REVERSAL. 3

McNeil v. Commonwealth, 468 S.W.3d 858 (Ky. 2015) 3

Wright v. Commonwealth, 391 S.W.3d 743 (Ky. 2012) 4

IV. THE TRIAL COURT VIOLATED RONALD EXANTUS' DUE PROCESS RIGHT TO A FAIR TRIAL BY FAILING TO REMOVE SEVERAL JURORS FOR CAUSE. 4

Fugett v. Commonwealth, 250 S.W.3d 604 (Ky. 2008) 4

Mootness 4

Juror 5199 5

Juror 5300 6

Shane v. Commonwealth, 243 S.W.3d 336 (Ky. 2007) 7

V. THE TRIAL COURT ERRED BY ALLOWING THE COMMONWEALH TO ADMIT KRE 404(b) EVIDENCE OF AN UNCHARGED ACT THAT RON EXANTUS CAUSED PHYSICAL INJURY TO HIS INFANT DAUGHTER BY SHAKING HER MORE THAN FIVE YEARS PRIOR TO THE INCIDENT IN HIS CASE. 7

KRE 703 7

404(b) 8

U.S. Const. Amend. V 8

U.S. Const. Amend. XIV 8

Chambers v. Mississippi, 410 U.S. 284 (1973) 8

ARGUMENT

I.

FAILURE TO GRANT A DIRECTED VERDICT OF ACQUITTAL AS TO THE THREE ASSAULT CONVICTIONS IS REVERSIBLE ERROR.

On page 6 of its brief, Appellee misleads this Court when it states that Koral took the knife from Ron, "then gave it back when he *commanded* her to give it back." (Brief for Appellee, page 6) (emphasis added). This is not what Koral testified to. She said that Ron "*asked* her if he could have it back" and she said, "yes, sir" and gave it back. (VR: 3/5/18; 1:27:40).

On page 7, Appellee insinuates that simply because Det. Ford took a picture of the superficial wound on Dakota's back, this fact somehow makes the injury more serious. (Brief for Appellee, p. 7). As Det. Ford testified, Dean Tipton, the father, described it as a superficial injury that required no additional treatment. (VR: 3/6/18; 11:55:22).

Appellee states that "Det. Ford also interviewed the Appellant that night and he seemed very lucid and candid in his answers to Det. Ford." (Brief for Appellee, p. 7). Appellee gives no citation to the record to support this statement, and it goes against the testimony of those involved in the arrest, interview and booking of Ron. On the way to the police station, Officer Geiler testified Ron read everything aloud as they passed street signs; anything written, Ron would read out loud. (VR: 3/6/18; 1:26:23). This continued throughout the police interview, where Ron read everything on the walls in the interview out loud. (*Id.*; 1:41:21). He read the patch on Det. Ford's jacket out loud. (*Id.*; 11:28:17). While transferring him to the jail, Ron continued this psychotic behavior. (*Id.*; 1:41:21).

In addition, Officer Geiler testified Ron exhibited an array of emotions including crying, anger, and confusion. (VR: 3/6/18; 1:40:04). This occurred en route to the police station, from the police station to the jail, and during booking. (*Id.*; 1:41:21).

Det. Ford testified he did not believe Ron was under the influence of alcohol or under the influence of drugs. (VR: 3/6/18; 11:25:10). Officer Geiler filled out the jail intake form when Ron was booked into jail. (*Id.*; 1:49:16). He checked the box on the form that Ron had not ingested large quantities of drugs or alcohol, and checked the box that he did appear to suffer from mental illness or mental retardation. (*Id.*; 1:50:11). Also while being booked, Ron complained about the police forcing his car over to the side of the road before arresting him; clearly, that is not what happened. (*Id.*; 1:48:03).

In footnote 2, page 8, Appellee cites to *Tungent v. Commonwealth*, 303 Ky. 834, 198 S.W.2d 785 (1947), *Wiseman v. Commonwealth*, 587 S.W.2d 235, 237 (1979) [sic], and *Brown v. Commonwealth*, 934 S.W.2d 242, 246-47 (Ky. 1996), for the proposition that as long as there is "some evidence" indicating the defendant was sane at the time of commission of the crime, this is a fact-finding issue for the jury. However, as is detailed in Ron's Brief for Appellant, at pages 25-27, nothing changed during the commission of the assaults from the burglary and the murder.

The jury clearly found that Ron was insane at the time of the event, by rendering the not guilty by reason of insanity verdict with regard to the murder and burglary. There is nothing in the record to indicate that Ron's mental state changed between the murder and burglary and the assaults of Koral, Dakota, and Dean Tipton. There is nothing in the record to indicate that the psychosis cleared momentarily. The Commonwealth did not introduce any evidence to rebut Dr. Benedict's findings that Ron was psychotic and manic during the event or was not insane.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED RON EXANTUS INSTRUCTIONS ON FOURTH DEGREE ASSAULT AS TO BOTH KORAL TIPTON AND DAKOTA TIPTON.

Counsel for Ron Exantus did seek an instruction on Assault in the fourth Degree as to Koral Tipton under a wanton theory. (VR V, 573). As argued in his Brief for Appellant, the law requires that the trial court instruct on every theory of the case the evidence supports. (Brief for Appellant, pages 27-31). And as Appellee concedes, the standard of review is considering the evidence in the light most favorable to Appellant. (Brief for Appellee, p. 11). Appellee also states:

> A defendant has a right to have every issue of facts raised by the evidence and exhibits submitted to the jury on proper instructions. He "is entitled to an instruction on any lawful defense which he has," *Hudson v. Commonwealth*, 202 S.W.3d 17, 20 (Ky. 2006), including instructions on lesser-included offenses.

(Brief for Appellee, p. 11).

III.

FAILURE TO INSTRUCT ON THE ELEMENT OF "DANGEROUS INSTRUMENT" REQUIRES REVERSAL.

Appellee's reliance on *McNeil v. Commonwealth*, 468 S.W.3d 858 (Ky. 2015) is misplaced. (Brief for Appellee, p. 16). There is a question the jury needed to answer to determine if the butter knife was a dangerous instrument. It has no definition to make this determination. If the jury had not found the butter knife to be a dangerous instrument, it would have acquitted Ron of assault in the second degree.

Unlike in *McNeil*, it cannot be said that "a properly instructed jury would clearly and beyond a reasonable doubt have made the additional finding." 468 S.W.3d at 863. In *McNeil*,

supra, the jury was given the definition of "dangerous instrument" but was not told the car would have to meet that definition. *Id.* While it is clear that a car that ran over one of the victims causing severe injuries would be a deadly weapon or dangerous instrument, a butter knife is not. Koral only suffered a small cut on her nose; Dakota had a superficial wound on her back. In *Wright v. Commonwealth*, 391 S.W.3d 743, 750 (Ky. 2012), this Court reiterated that "[o]ur prior case law holds that it is error to convict a defendant of a crime when the jury has not been properly instructed on the elements of the crime." (internal citations omitted).

"Dangerous instrument" is an element of assault in the second degree. Failure to define means the conviction for assault in the second degree of Koral and Dakota cannot stand because the jury was not properly instructed on this element as is required by law.

IV.

THE TRIAL COURT VIOLATED RONALD EXANTUS' DUE PROCESS RIGHT TO A FAIR TRIAL BY FAILING TO REMOVE SEVERAL JURORS FOR CAUSE.

Appellee correctly cites, "The determination of whether the trial court abused its discretion in not striking a juror for cause 'is based on the totality of the circumstances, [and] not on a response to any one question.' *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008). (Appellee's brief p. 18). However, Appellee then asks this court to forget the totality of the circumstances and argues the issue is moot because Exantus was found not guilty by reason of insanity and that trial court did not abuse its discretion because the jurors eventually said they could consider the entire range. (Appellee's brief p. 25 – 26).

Mootness.

Appellee argues the juror issues are moot when Appellant was found not guilty by reason of insanity. (Appellee's brief p. 25). Appellee states that "Appellant does not address the fact that

he was not subject to the penalty range, or specific mitigators, which he alleges the three (3) jurors would not fairly consider. Any allegation of error as to these jurors not being struck for cause was rendered moot when the Appellant was found not guilty by reason of insanity and this claim should be denied on this basis. (Appellee's brief p. 25).

Exantus was denied his right to a fair and impartial jury when he was denied the number of peremptory challenges allotted to him when forced to use peremptory challenges on jurors who should have been excused for cause. This occurred when Ron was forced to use 3 of these peremptory challenges on jurors who should have been excused for cause. Therefore, Exantus started on an unleveled playing field. Appellee fails to cite to any case law that would indicate that a reversible error juror issue is rendered moot based upon the sentence ultimately rendered.

Juror 5199.

As stated in Appellant's original brief, the totality of the circumstances dictated that Juror 5199 should have been excused for cause. Juror 5199 took it upon himself to inform the court that he potentially has some professional bias because he had an intricate knowledge about parole information and re-entry into the justice system. The trial court replied at that time that it may be better to go ahead and strike him at that time, however, the Commonwealth replied that it would rather go into that during individual voir dire.

During individual voir dire, Juror 5199 admitted that he did not know how objective his opinion would be. (*Id. At* 10:46:35). Juror 5199 informed the Court that he has already formed an opinion about whether Exantus is guilty or not guilty and again took it upon himself to inform the Court that he potentially could not sit and be fair and impartial based upon his job. (VR: 02/26/18; 10:45:40; 10:46:25). Juror 5199 replied that even his boss could not believe he was still in the jury panel. (*Id.* At 10:56:45).

Appellee states that Juror 5199 said that "he could consider a sentence with parole even with the outside expertise and knowledge that he had." (Appellee's brief p. 19). However, that response was not in relation to this case but a general question, given his job, does that mean he would not consider a sentence of parole and Juror 5199 responded that it would vary on the case. Therefore, in some cases he could consider a sentence of parole and in others he would not consider it.

Appellee states that after Juror 5199 stated he was not a big fan of the death penalty, that Juror 5199 stated he could consider the entire range of penalties. (Appellee's brief p. 20). Juror 5199 was asked if he would automatically rule out death penalty and Juror 5199 responded, "No." (VR: 02/28/18; 10:52:27). Juror 5199 was then asked, "You wouldn't automatically rule out term of years" to which Juror 5199 responded, "I think for me, just to be honest, age of the victim matters. I think like the conditions of the crime; I think play a big factor." (*Id.*). Counsel replied, "So depending on the age of the victim, you might rule out which penalties do you think?" Juror 5199 stated, "I might rule in certain penalties" referring to the death penalty. Upon further questioning, Juror 5199 then stated that he could not consider a sentence with the possibility of parole after 25 years. (*Id.* At 10:53:33).

Juror 5300.

Appellee focuses on the fact that Juror 5300 stated that she could consider the entire range of sentences however that response was during the death penalty questioning. Juror 5300 responded that the death penalty would be too easy for them, that she would want them to sit in jail for the rest of their life and watch what you did to all these people. (*Id.* at 03:21:55). Upon further examination, Juror 5300 then stated she would not consider a term of years where there would be a definite outdate, that **under no circumstance could she give somebody a 20-year**

sentence that had killed another human being and committed another serious felony. (*Id.* At 03:23:00) (emphasis added). Appellee argues that the hypothetical did not include the consideration of any potential mitigation. (Appellee's brief p. 22). Under no circumstances, Juror 5300 made it clear that she would not consider mitigation.

Failure to excuse the aforementioned jurors for cause was reversible error. "[T]he correct inquiry is not whether using a peremptory strike for a juror who should have been excused for cause had a reasonable probability of affecting the verdict (harmless error), but whether the trial court abused its discretion by not striking that juror for reasonable cause deprived the defendant of a substantial right." *Shane v. Commonwealth*, 243 S.W.3d 336, 341 (Ky. 2007). The court abused its discretion when it overruled the defense challenges for cause to these 3 jurors. Reversal is required.

V.

THE TRIAL COURT ERRED BY ALLOWING THE COMMONWEALH TO ADMIT KRE 404(b) EVIDENCE OF AN UNCHARGED ACT THAT RON EXANTUS CAUSED PHYSICAL INJURY TO HIS INFANT DAUGHTER BY SHAKING HER MORE THAN FIVE YEARS PRIOR TO THE INCIDENT IN HIS CASE.

Appellee argues that KRE 703 allows a party to cross examine an expert on the facts they relied upon in forming their opinion. (Appellee's brief p. 30). Appellee then states, "The Commonwealth asked Dr. Benedict what materials he relied upon in making his report and interviews with the defendant. *Id.* At 12:41:22. He testified that the only materials he relied upon in making his report was a copy of the competency evaluation performed at the Kentucky Correctional Psychiatric Center (KCPC) and medical records from UK medical hospital. *Id.*" (Appellee's brief p 30). Finally, Appellee argues that "This Court has consistently allowed a

party to cross-examine an expert on facts or data not admissible into evidence if they relied upon them in forming their opinion. (Appellee's brief p. 34).

However, the 404(b) evidence was not facts relied upon by Dr. Benedict in making his opinion. Defense asked, Whit if Dr. Benedict knows of this and it does not change his opinion? (VR: 03/13/18; 08:40:45). The trial court replied, "Then that's the end of the inquiry." (*Id.*). Defense replied, "So it should never be said in front of the jury though because this is a way for the Commonwealth to backdoor 404(b) information without us raising this as in issue. Dr. Benedict is not testifying as to character evidence, he's testifying as to tests that he took, social history that was reviewed." (*Id.*).

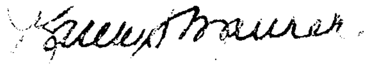
Defense offered several times to question Dr. Benedict outside the presence of the jury to see if the information regarding the prior uncharged incident would alter his opinion and if not, there was nothing to impeach him on. In fact, Dr. Benedict did testify that he had reviewed the additional information about Mr. Exantus and in reviewing that info, nothing changed in his opinion that Mr. Exantus suffered from a major mental illness and could not conform his conduct to the requirements of law. (VR 03/15/18; 10:28:05). The Commonwealth still was allowed to inform the jury of this prior uncharged 404(b) evidence.

The evidence of the prior uncharged act of Ron Exantus shaking and injuring his daughter was not probative and so fundamentally unfair that Ron Exantus' 5th and 14th Amendment rights to due process were violated. "Where constitutional rights directly affecting the ascertainment of guilt are implicated," evidence rules "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The error is not harmless. Due process requires reversal.

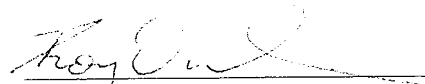
CONCLUSION

Ronald Exantus reiterates his arguments and statements from his Original Brief. Based on those arguments, and the foregoing arguments made in this Reply Brief, Mr. Exantus requests that his conviction and sentence be reversed, and his case be remanded to the Woodford Circuit Court with instructions to grant the appropriate relief.

Respectfully submitted,



KAREN SHUFF MAURER



ROY ALYETTE DURHAM II